Office Supreme Court, U.S.
FILED
APR 29 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 819.

IRVING MARDER,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS.

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts,
Attorney for the Appellee.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 819.

IRVING MARDER,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS.

Now comes the Commonwealth of Massachusetts, appellee, and moves that this appeal be dismissed on the grounds that the federal questions sought to be reviewed were not timely or properly raised, and that said appeal does not present a substantial question.

Statement of the Case.

In October, 1961, the appellant was the owner of a motor scooter that was parked on Billerica Street in the City of Boston for a period exceeding the legal time limit set for that area. The appellant was summoned to appear before the Boston Municipal Court on the overtime-parking charge, and pleaded "not guilty" at the time of arraignment. He was accordingly tried, found guilty, and fined $25. The appellant then appealed, was placed on bail,

and given a trial *de novo* in the Superior Court. Prior to trial in the Superior Court the appellant moved for dismissal of the charges against him, as per the "Motion to Dismiss" excerpts of which appear at pages 5-6 of the Jurisdictional Statement, and which has been reprinted in full as Appendix A hereto. The motion was denied, and the appellant took an exception.

The appellant was then tried, again found guilty, and fined $25, with a stay of execution pending appeal to the Supreme Judicial Court. The decision of that Court, from which this appeal is taken, appears at pages 14-18 of the Jurisdictional Statement.

Questions Presented.

1. Will an appeal lie under 28 U.S.C. § 1257(2), when no provision of the Constitution of the United States was ever specifically referred to either in the opinion of the state court from which the appeal is taken or by the appellant in the proceedings prior thereto?

2. Is a law providing criminal penalties for certain motor-vehicle parking violations rendered unconstitutional under the Fourteenth Amendment to the Constitution of the United States by the existence of a supplementary law providing for noncriminal disposition of the same offenses for persons electing to plead guilty, pay fines fixed at less than the maximum criminal penalties, and avoid trial?

Reasons for Granting the Motion to Dismiss.

I. The Federal Questions Sought to be Reviewed were Not Timely or Properly Raised.

Review of state court decisions under 28 U.S.C. § 1257(2), is limited to specific federal questions, properly

raised. *Whitney* v. *California*, 274 U.S. 357, 362-363. *Dewey* v. *Des Moines*, 173 U.S. 193, 197-198. *Wilson* v. *Cook*, 327 U.S. 474, 483-484. *Adler* v. *Board of Education*, 342 U.S. 485, 496. In order for an appeal to be brought to this court under the above section, an objection to the validity of the relevant state statute must be taken before judgment in the trial court, and, if such objection is based upon the statute's being repugnant to the Constitution of the United States, the relevant section thereof must be specified. *Brown* v. *Massachusetts*, 144 U.S. 573, 579. Thus, references to the "Constitution of the United States" (*Herndon* v. *Georgia*, 295 U.S. 441, 442-443; *Harding* v. *Illinois*, 196 U.S. 78, 88; *Capital City Dairy Co.* v. *Ohio*, 183 U.S. 238, 248); to the "Constitution and laws of the United States" (*Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 656); or to "due process of law" (*Bowe* v. *Scott*, 233 U.S. 658, 664-665) have all been held insufficient to sustain Supreme Court jurisdiction.

In the case at bar, no mention of any provision of the Federal Constitution appears in the appellant's Motion to Dismiss, nor is there any such reference in the opinion of the Supreme Judicial Court. The Motion to Dismiss contains the vague complaint that G.L. c. 90, §§ 20 and 20A, give rise to "unequal treatment under the law" and are therefore "unconstitutional." The phraseology is not that of the Fourteenth Amendment, and the concept of equality or equality of treatment could as readily be considered a reference to the Massachusetts Constitution.

> "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness." (Constitution, Declaration of Rights, article 1.)

Under such circumstances the constitutional objection will be deemed to refer to the Massachusetts Constitution and not the Federal Constitution. *New York Central Railroad Co.* v. *New York*, 186 U.S. 269, 273 (1901). *Bowe* v. *Scott*, 233 U.S. 658, 665 (1913). *Bryant* v. *Zimmerman*, 278 U.S. 63, 67-68 (1928).

Nor was the Fourteenth Amendment, or any other provision of the Federal Constitution, ever mentioned in the opinion of the Supreme Judicial Court. In the holding of that Court, the provisions of G.L. c. 90, § 20A, are deemed to be neither unreasonable nor discriminatory, nor in any way depriving the appellant of "due process of law"—a concept solidly established in the Constitution of Massachusetts. Massachusetts Constitution, Declaration of Rights, article 12. *Lowell Gas Co.* v. *Department of Public Utilities* (1949), 324 Mass. 80, 84 N.E. 2d 811; certiorari denied, 338 U.S. 825, 70 S. Ct. 71. *Pugliese* v. *Commonwealth* (1956), 335 Mass. 471, 140 N.E. 2d 476.

In support of his contention that the Supreme Judicial Court considered the constitutional objection in the light of the Fourteenth Amendment, appellant submits a letter to that effect from Associate Justice John V. Spalding. The law on this point, however, is stated in *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 186, n. 1, as follows:

> "While a certificate of the state court, made part of the record, to the effect that the federal question in issue was decided there is generally sufficient to sustain our jurisdiction, when it is consistent with the record . . . a certificate to the same effect by the presiding justice of the state appellate court does not suffice, although it may serve to interpret indefinite or ambiguous evidence in the record, relied upon to show that the federal question was raised."

In the instant case we have no certificate from either the court itself or from the presiding justice thereof. There is no authority whatsoever for giving any legal effect to a letter from an associate justice of the state court.

All of the above is applicable to the appellant's objection under the Fourteenth Amendment. No mention of or reference to the Sixth Amendment of any sort, however ambiguous, is to be found in either the Motion to Dismiss or in the opinion of the Supreme Judicial Court.

II. The Appeal does Not Present a Substantial Federal Question.

There is no contention by the appellant that G.L. c. 90, § 20, under which he was fined, would, standing alone, be unconstitutional. He urges, rather, that an otherwise constitutional criminal law somehow *becomes* unconstitutional by virtue of the existence of another law—*i.e.*, § 20A, which provides for expeditious, noncriminal disposal of the cases of those who choose to plead guilty. Such a system, taken as a whole, is claimed to violate the due process and equal protection clauses of the Fourteenth Amendment.

A. As to the appellant's contention that G.L. c. 90, §§ 20 and 20A, violate the due process clause of the Fourteenth Amendment:

This court has declared on more than one occasion that the state is the primary judge of regulations required in the interest of public safety, and its police statutes may only be declared unconstitutional when they are arbitrary and unreasonable attempts to exercise the authority vested in the state. *Graves v. Minnesota*, 272 U.S. 425, 428. *Holden v. Hardy*, 169 U.S. 366, 395.

Accordingly, the fixing of fines for the violation of state legislation is within the state's police powers, subject only

to the limitation that such fines must not be so grossly excessive as to amount to a deprivation of property without due process of law. *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111.

The appellant does not claim that a fine of $25 for his offense was in itself excessive. He complains, rather, that he was somehow deprived of his right to trial. Such a contention is unsupportable. The appellant had not one, but two, trials—an initial trial in the District Court and a trial *de novo* in Superior Court—and at both he was duly found guilty, and took appeal. Such a procedure can hardly be said to be lacking in due process.

B. As to the appellant's contention that G.L. c. 90, §§ 20 and 20A, violate the equal protection clause of the Fourteenth Amendment:

Appellant claims that the equal protection clause of the Fourteenth Amendment is violated because those pleading guilty under section 20A may receive more lenient treatment than those *found* guilty and fined under section 20. But the option of choosing whether to plead guilty and thus qualify under section 20A is open to all, and like treatment of all persons similarly situated is all that is required by the equal protection clause. *State Board of Tax Commissioners of Indiana* v. *Jackson*, 283 U.S. 527, 537. Equal protection of the laws is not diminished by a law or course of procedure which would have been applied to any other person in the state under similar circumstances and conditions. *Tinsley* v. *Anderson*, 171 U.S. 101, 106. *Walston* v. *Nevin*, 128 U.S. 578, 582. *Lowe* v. *Kansas*, 163 U.S. 81, 88. *German Alliance Insurance Co.* v. *Hale*, 219 U.S. 307, 318.

Admittedly, persons electing to plead guilty under section 20A may be treated differently from those who are

tried, found guilty and fined under section 20. But such a classification does not run afoul of the equal protection clause unless capricious, arbitrary or unreasonable; *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 527; *Walters* v. *City of St. Louis*, 347 U.S. 231, 237; and, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that, in the actual state of facts which surrounds its operation, its classifications lack rationality. *McGowan* v. *Maryland*, 366 U.S. 420, 425-428.

As pointed out in the opinion of the Supreme Judicial Court, section 20A was designed to establish "a simple and convenient procedure for the disposition, on essentially an administrative basis, of charged violations of motor vehicle parking regulations. . . . Its legislative history shows that it was enacted to relieve the burden placed upon the courts and the police in disposing of minor traffic violations under the usual criminal procedure and to free violators, many of whose violations are trivial and inadvertent, from inconvenience disproportionate to the gravity of their offence." *Commonwealth* v. *Marder*, 1963 Adv. Sh. 1052, 1053.

Such a purpose can hardly be called "arbitrary," "capricious" or "unreasonable." A classification having a reasonable basis does not offend against the equal protection clause merely because in practice it results in some inequality. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79. *Morey* v. *Doud*, 354 U.S. 457, 465. A state may make different arrangements for trial under different circumstances of even the same class of offenses. *Graham* v. *West Virginia*, 224 U.S. 616, 630.

On the basis of the foregoing, it is submitted that no substantial question of law is presented by this appeal.

Conclusion.

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General of the
Commonwealth of Massachusetts,
Attorney for the Appellee.

Appendix A.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court for
Criminal Business
No. 1103

COMMONWEALTH

vs.

IRVING MARDER

MOTION TO DISMISS

Now comes the defendant and moves that the Honorable Court dismiss, quash and abate this action for the following reasons:

1. Under the regulations of the BOSTON TRAFFIC COMMISSION, approved by the BOSTON CITY COUNCIL, under powers set forth in G. L. Chapter 90, § 20 and § 20A, defendant is placed in a position where he may suffer a greater penalty if he insists on a hearing and judicial determination of guilt than if he confesses guilt. This is UNEQUAL treatment under the LAW and therefore UNCONSTITUTIONAL.

More specifically, with respect to the offense here charged, he would be exposed to a maximum fine of $3.00 on a first offense in one calendar year per vehicle parking record if he accepted "noncriminal disposition" of his case, whereas he would be exposed to a maximum fine of $25.00 to $50.00 on this "first" offense depending on a lifetime personal-driving-as-well-as-parking record IF he insisted on a hearing and judicial determination of guilt.

2. Under G. L. Chap. 90, § 20 and 20A, he must bear the onus of a criminal record if he is found guilty of violations after insisting upon a hearing and judicial determination of guilt; whereas he bears no criminal record if he

confesses guilt. This is UNEQUAL treatment under LAW and UNCONSTITUTIONAL.

3. The DISCRIMINATORY treatment under LAW resulting from the wordings of G. L. Chap. 90, § 20 and 20A effectively INTIMIDATES defendant from insisting upon trial. Likewise these discriminatory statutes tend to place a premium upon admission of guilt even in cases where it does not exist, making a mockery of our courts.

4. There are many reasons why a defendant might seek judicial trial. He might object to the process or method of service of process. He might object to the authority of the officer issuing process. He might object to a specific regulation as not being in accordance with the statute. Or, he might have any number of valid DEFENSES. He ought not to be placed in a position where he fears to raise such valid defenses lest he pay a high premium. In no other category of crime is such double standard endorsed as a matter of LAW. To endorse such DOUBLE STANDARD here would be a whittling away of judicial powers and individual rights long recognized under our constitutional form of government.

5. A FINE OR PENALTY should be based upon the nature of the offense committed, and not upon the nature of the judicial method adopted, or insisted upon, for determination of guilt. To the extent that the FINE OR PENALTY in the instant case would be determined on the latter basis, this principle is violated; and the statutes giving rise to such violation of a long accepted principle of justice are accordingly unconstitutional.

WHEREFORE defendant prays the HONORABLE COURT that this action based on invalid statutes be dismissed, quashed or otherwise abated.

Respectfully submitted,
IRVING MARDER
Pro Se